



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 11, 1996

Ms. Tamara Armstrong
Assistant County Attorney
Travis County
County Courthouse
P.O. Box 1748
Austin, Texas 78767

OR96-0923

Dear Ms. Armstrong:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 17238.

The Travis County district attorney's office (the "district attorney") has received a request for information relating to a closed investigation into allegations of forgery of rare books. Specifically, the requestor seeks "any and all documents pertaining to your office's investigation into John H. Jenkins of Austin." You advise us that most of the requested information has been or will be made available to the requestor. You object, however, to release of some of the requested information. You claim that this information is excepted from required public disclosure by sections 552.101, 552.107, 552.108, and 552.111 of the Government Code.¹

You have submitted to this office for review eight exhibits, A through H. Exhibit B contains notes and memoranda of the prosecuting attorney. You claim that the portions of these documents marked in yellow are excepted from required public disclosure under the attorney-client privilege as incorporated into the Open Records Act by sections 552.101 and 552.107. Although this office has frequently cited section 552.101 to except from disclosure information within the attorney-client privilege, the privilege is more specifically covered under section 552.107. Open Records Decision No. 574 (1990). Open Records Decision No. 574 (1990) held that protection of section 552.107 was

¹The requestor has withdrawn his request to the extent that it seeks documents relating to a certain deposition obtained from Lloyds of London. Accordingly, we do not address its availability here.

limited to information that revealed client confidences to an attorney or that revealed the attorney's legal advice. Information that does not contain legal advice or opinion or reveal client confidences is not protected by section 552.107. *Id.* You claim that the highlighted portions of Exhibit B are "legal opinions rendered by associate attorneys handling the criminal case." Having examined Exhibit B, we conclude that the highlighted portion does not contain information that reveals an attorney's legal advice or opinion. This information may not be withheld from required public disclosure under section 552.107 of the Open Records Act.

You next claim that portions of several of the exhibits, primarily Exhibit C, are excepted from required public disclosure by section 552.101 in conjunction with the informer's privilege. The informer's privilege applies when a person reports violations of the law to officials having a duty to enforce the law. Open Records Decision No. 515 (1988) at 2. The informer's privilege serves to encourage the flow of information to the government by protecting the identity of the informer. *Id.* The basis for the informer's privilege is to protect informers from the fear of retaliation and thus encourage them to cooperate with law enforcement efforts. *Id.* However, once the identity of an informer is disclosed to those who would have cause to resent the communication, the privilege is no longer applicable. Open Records Decision No. 202 (1978).

The district attorney has a duty to prosecute persons accused of forgery, which is a felony of the second degree. Penal Code § 32.21. In this instance, however, one of the individuals who might have reason to resent the informers' communications is deceased. On the other hand, there is no indication in the records that other individuals alleged to have been involved in criminal conduct are aware of the identities of the informants. Thus, we conclude that the informer's privilege applies to some of the submitted information. We have marked the information that the district attorney may withhold under the informer's privilege component of section 552.101.²

Exhibit C also contains witness statements. You claim that section 552.108 excepts these statements from required public disclosure. Section 552.108 provides that:

(a) A record of a law enforcement agency or prosecutor that deals with the detection, investigation, and prosecution of crime is excepted from [required public disclosure].

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure].

²Unlike other aspects of section 552.101 of the Government Code, the informer's privilege is considered a discretionary exception that a governmental body may choose to assert or waive. *See* Gov't Code § 552.007; Open Records Decision No. 549 (1990). Therefore, the district attorney may choose to release to the public some or all of the information excepted from disclosure by the informer's privilege.

In an open criminal case, section 552.108 exempts from disclosure all information except that normally found on the first page of the offense report. *See generally Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 (1976). Once a case is closed, as in this case, information may be withheld under section 552.108 only if its release "will unduly interfere with law enforcement or crime prevention." *See Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Attorney General Opinion MW-446 (1982); Open Records Decision Nos. 444 (1986), 434 (1986). Although you generally claim that release of the witness statements would subject the witnesses to harassment or retaliation, you do not explain with any specificity how that will occur in this particular case, especially in light of the fact that the person about whom most of the statements were made is now deceased. Because you have not explained how release of the witness statements in Exhibit C would unduly interfere with law enforcement or prosecution, and because the documents do not provide such an explanation on their face, we have no basis to conclude that Exhibit C may be withheld from required public disclosure under section 552.108 of the Open Records Act.³

Exhibit E contains criminal history record information ("CHRI") that appears to have been generated by the Texas Crime Information Center ("TCIC") or the National Crime Information Center ("NCIC"). Title 28, Part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential criminal history records that the Department of Public Safety (the "DPS") maintains, except that the DPS may disseminate such records as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain criminal history record information; however, a criminal justice agency may not release the information except to another criminal justice agency for a criminal justice purpose, *id.* § 411.089(b)(1). Thus, any criminal history record information data that was generated by the federal government or another state may not be made available to the requestor by the district attorney except in accordance with federal regulations. *See* Open Records Decision No. 565 (1990). Furthermore, any criminal history record information received from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. We have marked the CHRI in Exhibit E that the district attorney must withhold pursuant to state and federal law.

Exhibit F contains information concerning ownership of rare books and documents or allegedly forged rare books and documents. You claim that these documents are excepted from required public disclosure by section 552.101 of the

³Exhibit D is an elaboration of your brief submitted under section 7 of the Open Records Act and as such is not responsive to the request.

Government Code in conjunction with the common-law and constitutional rights of privacy. Section 552.101 of the Open Records Act excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Information may be withheld from required public disclosure under common-law privacy if it meets the criteria articulated for section 552.101 by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Under the *Industrial Foundation* case, information may be withheld on common-law privacy grounds only if it is highly intimate or embarrassing and is of no legitimate concern to the public. The test for constitutional privacy involves a balancing of the individual's privacy interests against the public's need to know information of public concern. *Id.* The constitutional right of privacy protects information relating to marriage, procreation, contraception, family relationships, and child rearing and education. See Open Records Decision No. 447 (1986) at 4.

You have not explained, nor is it apparent after a review of the documents, how the information contained in Exhibit F implicates the common-law or constitutional privacy interests of third parties. We conclude that Exhibit F contains no information that is intimate or embarrassing; moreover, the public has a legitimate interest in the information. Accordingly, Exhibit F may not be withheld from required public disclosure under section 552.101 of the Government Code.⁴

Exhibits G and H contain various miscellaneous documents relating to the investigation. You claim that the information marked in yellow on Exhibit G is excepted from required public disclosure by section 552.101 in conjunction with federal tax laws and that information marked in yellow on Exhibit H is protected by common-law privacy. We conclude that the information marked on Exhibit G and some of the information marked on Exhibit H is intimate or embarrassing and of no legitimate concern to the public. See Open Records Decision Nos. 545 (1990) (concluding that background financial information about a person is generally protected by common-law privacy); 373 (1984) (same); 343 (1982) (enumerating the types of personal information about an individual that are normally protected by common-law privacy); 226 (1979) (regarding confidentiality of federal tax return information). We have marked the information that the district attorney must withhold under the common-law privacy aspect of section 552.101 of the Government Code.

We next address your contention that section 552.111 in conjunction with the attorney work-product doctrine excepts all of the requested information from disclosure. In the past, this office has concluded that in the context of the Open Records Act

⁴We note, however, that one of the documents contained in Exhibit F is copyrighted. A governmental body is not required to furnish copies of copyrighted records; members of the public may inspect and make copies of such records unassisted by the governmental body, but it assumes the duty and risk of compliance with copyright law. Open Records Decision No. 550 (1990); see also Open Records Decision No. 505 (1988).

the work-product doctrine applies only upon a showing that section 552.103(a) applies. *See* Open Records Decision No. 575 (1990). However, the issues you raise with respect to attorney work product are the subject of pending litigation which is now on appeal to the Texas Supreme Court. *See Holmes v. Morales*, 906 S.W.2d 570 (Tex. App.--Austin 1995, writ accepted). In light of the pendency of this litigation, ruling on your claims regarding work product would be inappropriate for this office. At this point, the outcome of the *Holmes* case may resolve your claims and may moot any decision this office might reach on those claims. For these reasons, we decline to rule on the issues you raise regarding attorney work product, and you may withhold the requested information pending the outcome of the *Holmes* case.

We also remind you that even if section 552.103 or section 552.111 excepts attorney work product from required public disclosure under the Open Records Act, both exceptions are discretionary. *See* Gov't Code § 552.007; Open Records Decision Nos. 542 (1990) at 4, 464 (1987) at 5. Section 552.007 provides as follows:

(a) This chapter does not prohibit a governmental body or its officer for public information from voluntarily making part or all of its information available to the public, unless the disclosure is expressly prohibited by law or the information is confidential under law.

(b) *Public information* made available under Subsection (a) must be made available to any person. [Emphasis added.]

The district attorney may, therefore, choose to release to the public some or all of the requested records that may be work product.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink that reads "Loretta DeHay". The signature is written in a cursive, flowing style with a large initial "L".

Loretta R. DeHay
Assistant Attorney General
Open Records Division

LRD/rho

Ref.: ID# 17238

Enclosures: Marked documents

cc: Mr. Kevin Mac Donnell
Mac Donnell Rare Books
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(w/o enclosures)